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No. 75-351

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1974

JEROME V. CALLAHAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

PAGE

Order Below 1

Jurisdiction 1

Questions Presented 2

Constitutional Provisions, Statutes and Rules Involved 4

Statement of the Case 7

Reasons for Granting the Writ 9

1. When petitioner indicated his desire to testify on one count but not on the other, he was prejudiced and deprived of a fair trial by the trial court's refusal to sever the counts for trial pursuant to F.R.Cr.P. 14. Moreover, petitioner has impermissibly been required to forfeit one constitutional right, *i.e.*, right to a fair trial, in order to exercise another constitutional right, *i.e.*, right to present a defense, in conflict with principles announced by this Court in *Simmons* v. *United States*, 390 U.S. 377 9

2. The evidence was insufficient to prove "extortion." To uphold petitioner's conviction for affecting commerce by extortion under color of official right, absent sufficient proof of extortion, requires an unconscionable overextension of the Hobbs Act and of federal jurisdiction. Certiorari should be allowed to dam the flood of Hobbs Act prosecutions inundating the federal courts based upon conduct which, if prosecutable at all, should be prosecuted strictly on a local level 14

3. Petitioner was prejudiced and deprived of a fair trial where the court permitted the prosecution to introduce evidence—absolutely essential to its case—at

PAGE

variance with the allegations of the indictment and with the bill of particulars, which evidence also was incompetent and prejudicial as proof of a crime prior to the indictment period and prior to the period as limited by the bill of particulars, and as to which the statute of limitations had run. This Court should review the Seventh Circuit's unprecedented relaxation of the limiting effect both of a bill of particulars pursuant to F.R.Cr.P. 7(f) and of the statute of limitations, 18 U.S.C. 3282, particularly since the instant decision conflicts with principles concerning the latter announced in *Toussie* v. *United States*, 397 U.S. 112 18

4. Petitioner was deprived of his right to a fair trial by the prosecution's prejudicial closing argument, which:

A. improperly referred to and heavily relied upon the erroneously admitted evidence at issue in Point 3, *supra*; and

B. incredibly stated that defense counsel had argued—when he had not—that petitioner was guilty of bribery 23

5. Petitioner was prejudiced by the court's improper instructions to the jury and by its refusal to instruct per defense requests, in the following respects:

A. Refusal to instruct concerning bribery and mere receipt of gratuity 27

B. Refusal to give accomplice testimony instruction 30

C. Instruction regarding testimony of immunized witness 32

PAGE

The court's erroneous refusal to instruct on petitioner's theory of the case effectively precluded petitioner from presenting said theory to the jury, in derogation of petitioner's due process rights and of his Sixth Amendment right to present evidence 36

6. The trial court committed prejudicial error by instructing the jury, in advance of any specific request by the jury, that the court would not consider any jury request during deliberations for portions of the evidence presented at trial. Such instruction constituted an impermissible abdication of judicial responsibility to exercise judicial discretion upon any such request if and when it may have arisen, effectively precluding the jury in advance from making any such request. Certiorari should be allowed so that this Court, in the exercise of its supervisory powers, may prevent trial courts from following this impermissible procedure 38

Conclusion 42

Appendix A—Order of the Court of Appeals entered May 5, 1975 .....App. 1

Appendix B—Order denying Rehearing in the Court of Appeals entered Aug. 7, 1975 .....App. 11

Appendix C—Summary of Facts .....App. 12

AUTHORITIES CITED

Cases

PAGE

Berger v. United States, 295 U.S. 78 (1935) 25

Bollenbach v. United States, 326 U.S. 607 (1946) 28

Briscoe v. United States, 391 F.2d 984 (D.C. Cir. 1968) 41

Cash v. Culver, 358 U.S. 633 (1959) 32

Chambers v. Mississippi, 410 U.S. 284 (1973) 12

Chapman v. California, 386 U.S. 18 (1967) .....26, App. 13

Cross v. United States, 335 F.2d 987 (D.C. Cir. 1964) 11, 13, 14

Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964) .. 12, 13, 20

Dunn v. United States, 318 F.2d 89 (5 Cir. 1963) 32

Easley v. United States, 261 F.2d 276 (5 Cir. 1958) .. 39

Holt v. Virginia, 381 U.S. 131 (1965) 12, 37

Hull v. United States, 324 F.2d 817 (5 Cir. 1963) 32

Kansas City Star Co. v. United States, 240 F.2d 643 (8 Cir. 1957) 27

Kotteakos v. United States, 328 U.S. 750 (1946) ..25, App. 13

Kuta v. United States, cert. pet. No. 75-307, filed August 28, 1975 (7 Cir. opinion not yet reported) 17

Levine v. United States, 261 F.2d 747 (D.C. Cir. 1958) 36

People v. Autman, 58 Ill.2d 171, 317 N.E.2d 570 (1974) 40

People v. Queen, 56 Ill.2d 560, 310 N.E.2d 166 (1974) .. 40

Phelps v. United States, 252 F.2d 49 (5 Cir. 1958) 32

Sears v. United States, 343 F.2d 139 (5 Cir. 1965) 39

Simmons v. United States, 390 U.S. 377 (1968) 2, 9, 13

PAGE

Staszcuk v. United States, cert. pet. No. 74-1579, filed June 13, 1975; reported (in part) at 502 F.2d 874 (7 Cir. 1974) 17

Stirone v. United States, 361 U.S. 212 (1960) 22

Toussie v. United States, 397 U.S. 112 (1970) 2, 18, 20, 23

United States v. Bass, 404 U.S. 336 (1971) 17

United States v. Braasch, 505 F.2d 139 (7 Cir. 1974) 13, 29, 34

United States v. Brown, 470 F.2d 285 (2 Cir. 1972) 40

United States v. Bryant, 442 F.2d 775 (D.C. Cir. 1971) 40

United States v. Carter, 475 F.2d 349 (D.C. Cir. 1973) 12

United States v. Daniels, 446 F.2d 967 (6 Cir. 1971) 41

United States v. Dellinger, 472 F.2d 340 (7 Cir. 1972) .. 39

United States v. Enmons, 410 U.S. 396 (1973) 17

United States v. Fierson, 419 F.2d 1020 (7 Cir. 1969) .. 20, 22, 23

United States v. Grimes, 413 F.2d 1376 (7 Cir. 1969) 36

United States v. Hartford, 489 F.2d 652 (5 Cir. 1974) .. 41

United States v. Haskins, 345 F.2d 111 (6 Cir. 1965) 22

United States v. Hurst, 436 F.2d 1092 (5 Cir. 1971) 39

United States v. Jackson, 257 F.2d 41 (3 Cir. 1958) .. 39, 40

United States v. Kahn, 472 F.2d 272 (2 Cir. 1973) 29

United States v. Neff, 212 F.2d 297 (3 Cir. 1954) 21

United States v. Phillips, 217 F.2d 435 (7 Cir. 1955) .. 28, 36, 37

United States v. Powell, 487 F.2d 325 (4 Cir. 1973) 39

United States v. Quinn, 365 F.2d 256 (7 Cir. 1966) 10

United States v. Reid, 410 F.2d 1223 (7 Cir. 1969) 34, 35

PAGE

United States v. Wiley, 267 F.2d 453 (7 Cir. 1959) 41

Washington v. Texas, 388 U.S. 14 (1967) 12, 37

Woosley v. United States, 478 F.2d 139 (8 Cir. 1973) .. 41

Other Authorities

United States Constitution, Amendment 5 .....4, 34, 37

United States Constitution, Amendment 6 .....3, 4, 21, 26, 36, 37

18 U.S.C. 1951 .....4, 7, 16, 17, 29, 30, 36

F.R.Cr.P. 32(c)(2) 40

28 U.S.C. 1254(1) 2

28 U.S.C. 3282 .....2, 5, 18, 19

F.R.Cr.P. 7 .....2, 5, 18

F.R.Cr.P. 8(a) 5, 9, 10

F.R.Cr.P. 14 .....2, 5, 9, 10, 13

F.R.Cr.P. 32(c)(2) 40

Supreme Court Rule 22.2 2

Chap. 38, sec. 33-1, Ill. Rev. Stat. 6, 17

Chap. 38, sec. 33-3, Ill. Rev. Stat. 6, 17

Chap. 110A, sec. 451(a), Ill. Rev. Stat., Sup. Ct. Rule 451(a) 7

I.P.I. Crim. No. 21.07 .....6, 29, 32

Devitt & Blackmar, Inst. No. 62.09 28

LaBuy, Manual on Jury Instructions in Federal Criminal Cases (1965) 31

LaBuy Inst. No. 6.07 31

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No.

JEROME V. CALLAHAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Jerome V. Callahan, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Order Below

The order of the Court of Appeals, unpublished per Seventh Circuit Rule 28, is reprinted as Appendix A, *infra.*

Jurisdiction

The order of the Court of Appeals was entered on May 5, 1975. Petitioner's petition for rehearing and suggestion for rehearing in banc, timely filed, was denied on August

7, 1975. (App. B) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 22.2 of the Rules of this Court.

Questions Presented

1. Where petitioner indicated his desire to testify on one count but not on the other, was he not prejudiced and deprived of a fair trial by the trial court's refusal to sever the counts for trial pursuant to F.R.Cr.P. 14? Moreover, has not petitioner impermissibly been required to forfeit one constitutional right, *i.e.*, right to a fair trial, in order to exercise another constitutional right, *i.e.*, right to present a defense, in conflict with principles announced by this Court in *Simmons* v. *United States*, 390 U.S. 377?

2. Does it not require an unconscionable overextension of the Hobbs Act and of federal jurisdiction to uphold petitioner's conviction for affecting commerce by extortion under color of official right, absent sufficient proof of "extortion"?

3. Where the court permitted the prosecution to introduce evidence—absolutely essential to its case—at variance with the allegations of the indictment and with the bill of particulars, which evidence also was incompetent and prejudicial as proof of a crime prior to the indictment period and prior to the period as limited by the bill of particulars, and as to which the statute of limitations had run, was not petitioner thereby prejudiced and deprived of a fair trial? Should not this Court review the Seventh Circuit's unprecedented relaxation of the limiting effect both of a bill of particulars pursuant to F.R.Cr.P. 7(f), and of the statute of limitations, 18 U.S.C. 3282, particularly since the instant decision conflicts with principles concerning the latter announced in *Toussie* v. *United States*, 397 U.S. 112?

4. Was not petitioner deprived of his right to a fair trial by the prosecution's prejudicial closing argument, which:

A. improperly referred to and heavily relied upon the erroneously admitted evidence at issue in Question 3, *supra;* and

B. incredibly stated that defense counsel had argued—when he had not—that petitioner was guilty of bribery?

5. Was not petitioner prejudiced by the court's improper instructions to the jury and by its refusal to instruct per defense requests, in the following respects:

A. refusal to instruct concerning bribery and mere receipt of gratuity;

B. refusal to give accomplice testimony instruction;

C. instruction regarding testimony of immunized witness;

and, moreover, did not the court's erroneous refusal to instruct on petitioner's theory of the case effectively preclude petitioner from presenting said theory to the jury, in derogation of his due process rights and of his Sixth Amendment right to present evidence?

6. Did the trial court commit prejudicial error by instructing the jury, in advance of any specific request by the jury, that the court would not consider any jury request during deliberations for portions of the evidence presented at trial; and did not such instruction constitute an impermissible abdication of judicial responsibility to exercise judicial discretion upon any such request if and

when it may have arisen, effectively precluding the jury in advance from making any such request?

Constitutional Provisions, Statutes and Rules Involved

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall be held to answer to a[n] . . . infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be deprived of life, liberty or property, without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . . [and] to have compulsory process for obtaining witnesses in his favor . . ."

Section 1951, Title 18, United States Code, provides in pertinent part:

> "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> • • •
>
> (2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

* * *"

Section 3282, Title 28, United States Code, provides:

"Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

Rule 7(f) of the Federal Rules of Criminal Procedure (Title 18, United States Code), provides in pertinent part:

"The court may direct the filing of a bill of particulars . . ."

Rule 8(a) of the Federal Rules of Criminal Procedure (Title 18, United States Code), provides:

"Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

Rule 14 of the Federal Rules of Criminal Procedure (Title 18, United States Code), provides in pertinent part:

"If it appears that a defendant . . . is prejudiced by a joinder of offenses . . . in an indictment . . . or

by such joinder for trial together, the court may order an election or separate trials of counts, . . . or provide whatever other relief justice requires . . ."

Chapter 38, Section 33-1, Illinois Revised Statutes, provides in pertinent part:

"§ 33-1. Bribery.

A person commits bribery when:

(a) With intent to influence the performance of any act related to the employment or function of any public officer, public employee or juror, he promises or tenders to that person any property or personal advantage which he is not authorized by law to accept;

. . .

• • •

(d) He receives, retains or agrees to accept any property or personal advantage which he is not authorized by law to accept knowing that such property or personal advantage was promised or tendered with intent to cause him to influence the performance of any act related to the employment or function of any public officer, public employee or juror; . . ."

Chapter 38, Section 33-3, Illinois Revised Statutes, provides in pertinent part:

"§ 33-3. Official Misconduct.

A public officer or employee commits misconduct when, in his official capacity, he commits any of the following acts:

• • •

(d) Solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law."

Instruction No. 21.07, Illinois Pattern Jury Instructions in Criminal Cases (generally applicable in State criminal

trials in Illinois via Illinois Supreme Court Rule 451(a), Chap. 110A, Sec. 451(a), Ill. Rev. Stat.), provides in pertinent parts as follows:*

> "A person commits the crime of bribery who,
>
> [1] promises or tenders any [property—personal advantage] to a [public officer—employee-juror] with intent to influence the performance of any act related to the [officer's—employee's juror's] employment or function;
>
> • • •
>
> [4] [receives—retains—agrees to accept] any [property—personal advantage] knowing that the [property—personal advantage] [was tendered—promised] with intent to cause him to influence the performance of any act related to the employment or function of a [public officer—employee-juror];
>
> • • •
>
> [A public employee is a person who is authorized to perform an official function on behalf of, and is paid by (any political subdivision of) the State.]"

STATEMENT OF THE CASE

Petitioner, Jerome V. Callahan, was convicted of having violated the Hobbs Act, 18 U.S.C. 1951, in that he obstructed commerce by extortion by obtaining quantities of liquor from Robert J. Medow, operator of a liquor store, by wrongful use of his position as a Chicago police officer, from January, 1969 to July, 1971. (R. 1)[1] Conviction was

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* The brackets are included in the original; inapplicable portions within the brackets are to be omitted from instructions given.

[1] "R." refers to the Record on Appeal, and "Tr." to the Transcript of Proceedings at trial, both filed with the Court of Appeals in No. 74-1618.

upon Count II of a two-count indictment (73 CR 890).[2]

Petitioner's pre-trial motion to sever the counts for trial (R. 12) was denied. (R. 21) Petitioner's motion to limit the evidence to the allegations of the indictment and the bill of particulars (R. 48) was denied. (R. 50) The court denied petitioner's motion for acquittal at the close of the government's case and at the close of all the evidence. (R. 55)

The jury found petitioner not guilty on Count I and guilty on Count II. (R. 56)

Defendant's post-trial motions in arrest of judgment (R. 59) and for judgment of acquittal notwithstanding the verdict or for new trial (R. 60) were denied (R. 61), and the court sentenced him to three years probation with the first 90 days in custody. (R. 61)

• • •

A summary of the evidence is set forth as Appendix C, *infra*. Factual details necessary to petitioner's arguments are fully set forth during the course of this Petition where pertinent, and are not repeated herein to avoid unnecessary duplication.

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[2] The jury acquitted petitioner of a separate Hobbs Act accusation, concerning a different tavern owner, charged in Count I, at petitioner's joint trial upon both counts. (R. 56)

Count I charged that petitioner obstructed commerce by extortion, in that he obtained $750 from Joseph Sannasardo, owner of Sano's Liquors, by threatening to use his position as a Chicago Police Officer to obstruct Sano's business in January, 1969. Count II charged that petitioner obstructed commerce by extortion, in that he obtained certain quantities of liquor from Robert J. Medow, operator of Southport Crown Liquors, Inc., by wrongful use of his position as a Chicago Police Officer with Medow's consent, said consent being induced under color of official right, from January, 1969 to July, 1971. (R. 1)

REASONS FOR GRANTING THE WRIT

1.

When petitioner indicated his desire to testify on one count but not on the other, he was prejudiced and deprived of a fair trial by the trial court's refusal to sever the counts for trial pursuant to F.R.Cr.P. 14. Moreover, petitioner has impermissibly been required to forfeit one constitutional right., i.e., right to a fair trial, in order to exercise another constitutional right, i.e., right to present a defense, in conflict with principles announced by this Court in Simmons v. United States, 390 U.S. 377.

Petitioner's motion for severance of the counts for trial[3] (R. 12) was denied. (R. 21) The Seventh Circuit agreed that this ruling was proper. (App. A, pp. 3-5)

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[3] Petitioner's motion for severance was alternatively based upon Federal Rules of Criminal Procedure 8(a) and 14 (set forth at pp. 5-6, *supra*). While arguing that joinder was improper under Rule 8(a), he argued in the alternative that, even if joinder were initially proper, severance should be granted pursuant to Rule 14 since joinder of the counts for trial under the circumstances was prejudicial.

Rule 8(a) defines the outer limits of permissible joinder of offenses, while Rule 14 requires severance for trial even of offenses technically joinable under Rule 8(a) if joinder is prejudicial.

As to the charges alleged in Counts I and II against petitioner, only that portion of Rule 8(a) permitting joinder of offenses of the same or similar character is arguably applicable herein, since clearly they are neither based on the same act or transaction, nor are they part of a common scheme or plan.

(footnote continued)

Assuming, *arguendo,* that joinder was initially proper under F.R.Cr.P. 8(a),[4] still there was prejudice in the joinder, requiring severance pursuant to F.R.Cr.P. 14, for petitioner asserted below that he desired to testify on one count but not on the other. (R. 17, p. 4) Even though the jury acquitted petitioner upon one of the two counts, this does not obviate the prejudice incurred as to the count

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(footnote continued)

That each count charges an alleged violation of the Hobbs Act does not in and of itself render the offenses charged of "the same or similar character." In *United States* v. *Quinn,* 365 F.2d 256, 263-64 (7 Cir. 1966), the court held that two counts of banking law violations arising out of one set of circumstances were not properly joinable, under Rule 8(a), with two other counts of banking law violations under the same statutes as the first two but arising out of a different set of circumstances.

Here, although violations of a single statute are charged, the alleged offenses are wholly dissimilar in the following respects:

(1) Two separate alleged victims are involved; (2) The objects of the alleged offenses are dissimilar (money in Count I, liquor in Count II); (3) Count I alleges a single, isolated act on a single occasion in January, 1969, while Count II alleges that the offense was a continuing one between January, 1969 and June, 1971; (4) Count I alleges extortion both by fear and under color of official right, while Count II alleges the extortion was committed solely under color of official right. Under the principles which rendered the two pairs of offenses non-joinable in *Quinn, supra,* severance was mandatory herein pursuant to Rule 8(a).

[4] But see petitioner's argument, footnote 3, *supra,* rejected by the Court of Appeals. (App. A, pp. 3-4)

upon which he was convicted; for, by effectively being precluded from testifying in his own defense upon Count II—for purely practical reasons—he was embarrassed, thwarted and confounded in his joint defense of the two charges simultaneously. Even acquittal of one charge does not vitiate the prejudice which infected the other. *Cross* v. *United States*, 335 F.2d 987 (D.C. Cir. 1964).[5]

And, irrespective of the prejudice due to petitioner's desire to defend each of the two charges in an independent and distinct manner, there is the prejudice which is

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[5] The Court in *Cross*, reversing defendant's conviction on one count due to prejudicial joinder even though the jury acquitted him upon the other count, where he had expressed a desire to testify upon one count but not the other, characterized the dilemma confronting such a defendant (like petitioner in the case at bar) as follows:

> "Prejudice may develop when an accused wishes to testify on one but not the other of two joined offenses which are clearly distinct in time, place and evidence. His decision whether to testify will reflect a balancing of several factors with respect to each count: the evidence against him, the availability of defense evidence other than his testimony, the plausibility and substantiality of his testimony, the possible effects of demeanor, impeachment, and cross-examination. *But if the two charges are joined for trial, it is not possible for him to weigh these factors separately as to each count.* If he testifies on one count, he runs the risk that any adverse effects will influence the jury's consideration of the other count. Thus he bears the risk on both counts, although he may benefit on only one. Moreover, *a defendant's silence on one count would be damaging in the face of the express denial of the other.* Thus he may be coerced into testifying on the count upon which he wished to remain silent. It is not necessary to decide whether this invades his constitutional right to remain silent, since we think it constitutes prejudice within the meaning of Rule 14." *Cross* v. *United States*, 335 F.2d 987, 989 (D.C. Cir. 1964). (Emphasis added.)

always inherent in the jury's hearing evidence of two distinct offenses at a single trial: that the jury must have regarded all the evidence cumulatively, being influenced by the sum total of all the evidence,[6] *United States* v. *Carter*, 475 F.2d 349 (D.C. Cir. 1973); that they may use evidence pertaining to each of the offenses improperly to infer a criminal disposition to commit the other, *Drew* v. *United States*, 331 F.2d 85, 88 (D.C. Cir. 1964); and "a less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one." *Ibid.*

Here, rather than being coerced into testifying upon Count I when he desired to testify only upon Count II, petitioner, faced with the court's requirement that he be tried on both counts together, chose what he believed to be the lesser of the evils: he did not testify upon either count, despite his desire to offer his own testimony on his behalf as to Count II. In effect, the trial court's ruling, approved by the Seventh Circuit, forced petitioner to make a constitutionally impermissible choice: give up his constitutional right to a fair trial upon Count I in order to exercise his equally important constitutional right to present evidence in his defense, (*i.e.*, his testimony), upon Count II. The choice he actually made was to forfeit the right to present defense evidence.[7]

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[6] See App. C, *infra*.

[7] The Constitution guarantees a defendant in a criminal case the right to present evidence in his own behalf. *Holt* v. *Virginia*, 381 U.S. 131, 136 (1965); *Washington* v. *Texas*, 388 U.S. 14, 17-19 (1967); *Chambers* v. *Mississippi*, 410 U.S. 284, 294-95 (1973).

This Court has held that putting a defendant to such a choice between two constitutional rights is impermissible:

> "[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons* v. *United States*, 390 U.S. 377, 394 (1968).

Once petitioner made the good faith assertion of his wish to testify on only one of the two counts, and nothing appearing to the contrary, the *Cross* principle, *supra*, considered in context with the other authorities herein, required severance under Rule 14. The Seventh Circuit's holding to the contrary, (App. A, p. 5), is clearly erroneous, for the prejudice is apparent in the factual context of this case.[8] (See App. C, *infra*.)

Certiorari should be allowed, so that the Court may express itself regarding the fundamental fairness requirements of due process of law as embodied in F.R.Cr.P. 14

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[8] The Court of Appeals ignored petitioner's additional argument that the countervailing consideration, (the economy of a single trial), see *Drew* v. *United States*, 331 F.2d 85, 88 (D.C. Cir. 1964), and *United States* v. *Braasch*, 505 F.2d 139, 150 (7 Cir. 1974), which may be weighty in a multi-count, multi-defendant case, is plainly inapplicable in such a case as this, involving but a single defendant and two relatively simple charges.

Nor has it answered petitioner's suggestion that in the context of being one of a large group of highly publicized "police graft" and "official corruption" cases recently tried within this District, and because of the general community awareness of the U.S. Attorney's high record of convictions in his continuing war on local official corruption, what may not necessarily amount to that degree of prejudice necessitating Rule 14 severance in a "garden variety" case *does* require such severance where a single high-ranking Chicago police officer is charged with two unrelated accusations of extortion. (Petitioner was a Police Captain and Watch Commander. See Tr. 258.)

where a defendant wishes to testify on only one of two counts set for joint trial. The Seventh Circuit's opinion does nothing to clarify this important issue which obviously arises frequently in federal criminal trials.

Moreover, this Court should grant review because the instant opinion appears to conflict, not only with a holding of the District of Columbia Circuit,[9] but also with principles heretofore announced by this Court.

2.

The evidence was insufficient to prove "extortion." To uphold petitioner's conviction for affecting commerce by extortion under color of official right, absent sufficient proof of extortion, requires an unconscionable overextension of the Hobbs Act and of federal jurisdiction. Certiorari should be allowed to dam the flood of Hobbs Act prosecutions inundating the federal courts based upon conduct which, if prosecutable at all, should be prosecuted strictly on a local level.

The evidence pertaining to the alleged extortion in Count II, of which petitioner stands convicted, fully set forth in App. C, pp. App. 12-18, *infra*, is not repeated at length herein.

The testimony of Robert J. Medow, alleged "victim" of the alleged extortion (Tr. 326-61), together with that of William Nass, Medow's employee (Tr. 362-68), does not establish that petitioner committed extortion; rather, it clearly demonstrates that, at worst, what took place was receipt by petitioner of gratuitous gifts of various quantities of liquor from Medow, given to petitioner due to Medow's desire to retain petitioner as a friend and to

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[9] *Cross* v. *United States*, cited and discussed in footnote 5, *supra*.

ensure adequate police protection for Medow's trucks and substantial inventory—not "protection" in any sinister sense of graft and failure to arrest for liquor law violations, but protection in the sense of assuring police surveillance to prevent thefts by third persons. (Tr. 357-58)

The lack of any extortionate character adhering to petitioner's receipt of the liquor is evident from such other factors as:

(1) Medow continued to give petitioner liquor for a considerable period of time *after* Medow ceased his previous practice of illegally selling liquor to taverns—which was the government's theory of the case, that is, that Medow gave the liquor to petitioner to persuade petitioner not to arrest him for such illegal sale of liquor. (Tr. 360-61; 345-46)

(2) Medow instructed Nass to give petitioner liquor if and when petitioner came into the store in Medow's absence; Nass, a long-time and trusted employee of Medow (Tr. 342, 367-68) had no knowledge of any wrongdoing by petitioner with relation to Medow and/or the gifts of liquor. (Tr. 362-68)

(3) Medow had unsuccessfully tried to intercede with petitioner on behalf of a bar-owner friend of Medow's. (Tr. 346-47)

(4) Medow was invited to a party at petitioner's home, and provided decorations for said party. (Tr. 353-54)

(5) In October, 1970, (during the indictment period), petitioner purchased champagne for his daughter's wedding from Medow, who helped him select a good champagne and gave him a good price (Tr. 345-48); Medow's close, friendly relationship with petitioner is further evident from the fact that he

knew that petitioner's intended son-in-law was Jewish. (Tr. 348)

(6) Petitioner never threatened Medow during the indictment period (Tr. 354); nor did he at any time threaten to put Medow out of business or take his license (Tr. 356); nor did Medow ever ask petitioner for any improper act. (Tr. 351)

Moreover, Medow testified that he had made various other gifts to other Chicago police officers in the past, both at Christmas time and on other occasions, both of cash and liquor. (Tr. 349) This too cuts against the government's theory that his gifts of liquor to petitioner were the result of extortion.

Rather than demonstrating extortion, the record reflects that Medow desired to have and keep petitioner as a friend, for obvious reasons, and that this and only this truly motivated his continuing gifts of liquor to petitioner. Nothing that petitioner ever said or did changed this picture. (See Tr. 354, 356) For Medow testified:

> "[I]f you are a retail liquor license holder in Chicago, Police Captains are very important. If I had a choice of having one as a friend or enemy, it would be better to have a friend. I don't know what the Captain intended to do, but that is the way I felt." (Tr. 340)

And again, on cross-examination, Medow reiterated his desire to have petitioner as a friend, given the choice. (Tr. 351)

This evidence clearly fails to establish "extortion" as defined by the Hobbs Act, 18 U.S.C. 1951(b)(2). Accordingly, the trial court should have granted petitioner's motion for directed verdict for insufficiency of the evidence. (R. 55) The Seventh Circuit deemed the evidence sufficient. (App. A, pp. 9-10)

If petitioner was to be prosecuted, he should have been prosecuted under applicable local law.[10]

This case represents but one in a series of recent cases emanating from the Seventh Circuit wherein the Hobbs Act has been used to reach so-called local official corruption[11] under circumstances where federal jurisdictional concepts must be stretched to the breaking point to justify prosecution.[12]

To uphold petitioner's conviction herein requires an unwarranted overextension of the Hobbs Act and of federal jurisdiction, contrary to principles involving the federal-state balance enunciated by this Court in *United States* v. *Bass*, 404 U.S. 336, 349 (1971), recently reaffirmed in *United States* v. *Enmons*, 410 U.S. 396, 411-12 (1973).

Certiorari should be allowed so that this Court may have an opportunity to dam the flood of Hobbs Act prosecutions inundating the federal courts based upon conduct which, if prosecutable at all, should be prosecuted strictly on a local level.

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[10] Petitioner could be prosecuted under applicable Illinois law either for Bribery, chap. 38, sec. 33-1(d), or for Official Misconduct, chap. 38, sec. 33-3 (see p. 6, *supra* for applicable sections).

[11] See footnote 8, *supra*.

[12] See, *e.g.*, the pending Petitions for Certiorari in *Kuta* v. *United States*, No. 75-307, filed August 28, 1975, (not yet reported), and *Staszcuk* v. *United States*, No. 74-1579, filed June 13, 1975, reported (in part) at 502 F.2d 874 (7 Cir. 1974).

3.

Petitioner was prejudiced and deprived of a fair trial where the court permitted the prosecution to introduce evidence—absolutely essential to its case—at variance with the allegations of the indictment and with the bill of particulars, which evidence also was incompetent and prejudicial as proof of a crime prior to the indictment period and prior to the period as limited by the bill of particulars, and as to which the statute of limitations had run. This Court should review the Seventh Circuit's unprecedented relaxation of the limiting effect both of a bill of particulars pursuant to F.R.Cr.P. 7(f) and of the statute of limitations, 18 U.S.C. 3282, particularly since the instant decision conflicts with principles concerning the latter announced in Toussie v. United States, 397 U.S. 112.

In an unprecedented holding portending great danger to the possibility of fair trials, the Seventh Circuit has approved the trial court's admission into evidence of conversations between petitioner and Medow (the "victim" in Count II) going back to 1967 [13]—a time which substantially pre-dated the allegations of the indictment,[14] the

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[13] The government presented substantial evidence concerning petitioner's alleged extortion of Medow *prior* to the earliest period alleged in the indictment and the bill of particulars, *i.e.*, prior to January, 1969. (Tr. 334-39) This evidence was admitted over defense objection, and petitioner's several motions for mistrial based thereon were denied. (Tr. 336-38) According to the government's case, petitioner began receiving cases of liquor from Medow in *May or June of 1967*. (See. Tr. 332-39)

[14] Count II alleged that the Hobbs Act violation charged therein took place "from in or about January, 1969 to and including in or about July, 1971, the exact dates being unknown to the grand jury." (R. 1, p. 3)

government's answer to defendant's motion for a bill of particulars [15] and the applicable statute of limitations.[16] (App. A, pp. 6-8)

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[15] Paragraphs 4, 6 and 11 of the government's answer to petitioner's motion for a bill of particulars specifically limits its proof to the period charged in the indictment and thereafter. (R. 21-A)

In answer to petitioner's motion for a bill of particulars, the government stated:

> "4. Day or dates, including the time of day, the alleged extortion of Robert J. Medow took place: the exact dates and times are not known. The alleged extortion of Medow took place *on numerous and various days during the period charged in the indictment* and at various times during the day . . . (Emphasis added.)
>
> * * *
>
> 6. The Government's answer as to the dates, including the time of day, when the defendant allegedly received liquor from Robert J. Medow is the same as our answer found in paragraph four above.
>
> * * *
>
> 11. The exact time when the defendant obstructed, delayed or affected commerce as to counts one and two includes the times of the described threats and wrongful use of the defendant's police position, the times at which the money and liquor were received by the defendant and all periods of time thereafter in which the financial resources of the victims were depleted as a result of the alleged extortions." (R. 21-A)

[16] Under 28 U.S.C. 3282, the statute of limitations applicable to the offense alleged is five years. (See p. 5, *supra.*) The indictment in the case at bar was returned on Dec. 13, 1973. (R. 1) The indictment alleged that the criminal activity in Count II allegedly occurred between January 1969 and July 1971. But the evidence herein complained of related to the period *prior* to January 1969 which began in May or June of 1967. The statute of limitations, then, would bar conviction for any offense committed prior to Dec. 13, 1968. Yet the court permitted the prosecution to introduce such evidence relative to alleged criminal conduct by petitioner approximately 18 or 19 months *prior* to the earliest possible time for which

(footnote continued)

The government's proof should have been limited upon Count II to alleged extortion from January, 1969 to July, 1971, and to effect on commerce during that period and thereafter. Neither the indictment nor the bill of particulars covered any allegations as to any period of time *prior* to January, 1969.

Since the prior acts thus took place long before the applicable statutory limitation period, no arguable exception to the general rule forbidding admission of "prior crimes" evidence[17] can possibly permit its admission,

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(footnote continued)

petitioner could lawfully have been prosecuted. Such holding conflicts with this Court's view, as expressed in *Toussie* v. *United States*, 397 U.S. 112, 114-15 (1970), that statutes of limitation are to be liberally interpreted in favor of repose, and that such limitation "is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past."

[17] "As a general rule, evidence of prior criminal acts of an accused, which are not charged in the indictment or information, is inadmissible." *United States* v. *Fierson*, 419 F.2d 1020, 1022 (7 Cir. 1969).

The specific exceptions to the general rule of exclusion are:

> "Evidence of other crimes is admissible when relevant to (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of the one tends to establish the other, and (5) the identity of the person charged with the commission of the crime on trial. When the evidence is relevant and important to one of these five issues, it is generally conceded that the prejudicial effect may be outweighed by the probative value." *Drew* v. *United States*, 331 F.2d 85, 90 (D.C. Cir. 1964).

where, as here, the government's case totally failed without such evidence.[18]

Moreover, since the government, by its answer to petitioner's motion for a bill of particulars, specifically limited its proof to the period of time covered by the indictment (R. 21-A), it was therefore barred from introducing evidence relating to the earlier time period not mentioned either in the indictment or in the bill of particulars, notwithstanding any arguable exception to the general exclusion of evidence of prior crimes. *United States* v. *Neff*, 212 F.2d 297, 309 (3 Cir. 1954).[19]

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[18] Without the evidence beginning in May or June of 1967, the government could not even arguably make out a prima facie case under Count II. Medow's testimony cannot possibly be construed to make out a prima facie case of extortion against petitioner absent the evidence which pre-dates the applicable statute of limitations. (See Tr. 332-42; see App. C, pp. 13-18)

The Seventh Circuit's reasoning, allowing admission of the 1967 evidence because of its "probative value," (App. A, pp. 7-8, recognizes this. Also: "It was at this early date that the conversation regarding illegal deliveries took place," App. A, p. 6; see also App. A, p. 2; and: *"Of course, the 1967 original conversation between Medow and appellant was indispensable to an understanding of the subsequent actions by the parties."* App. A, p. 7 (Emphasis added)

[19] The bill of particulars was furnished in accordance with F.R. Cr.P. 7(f). This effectively limited the government's proof to the extent that evidence of the 1967 and 1968 transactions between Medow and petitioner should have been barred from admission into evidence.

> "[A] bill of particulars 'Once obtained * * * concludes the rights of all parties who are to be affected by it, and he who has furnished the bill of particulars under it, must be confined to the particulars he has specified . . .' Otherwise stated, a bill of particulars strictly limits the prosecution to proof within the area of the bill." *United States* v. *Neff*, 212 F.2d 297, 309 (3 Cir. 1954).

The Seventh Circuit's attempt to distinguish the instant case from *Neff*, App. A, p. 8, fn. 1, is clearly erroneous, since in each case conviction depended upon the jury's hearing the evidence which had been omitted from the bill of particulars. See note 18, *supra*.

Petitioner recognizes, of course, that variance between the proof and the bill of particulars is grounds for reversal only if he was prejudiced by the variance.[20] But here, petitioner has obviously been prejudiced, for he was taken by surprise by the testimony concerning the prior transactions,[21] and without such evidence, the government had no case. Indeed, the government referred to the 1967 evidence in closing argument, pointedly emphasizing it to the jury. (See Point 4, *infra;* Tr. 452, 457, 459, 483-84.)

Moreover, the Seventh Circuit has misconstrued and unduly limited its own previous holding in *United States* v. *Fierson,* 419 F.2d 1020, 1023 (7 Cir. 1969),[22] improperly

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[20] *United States* v. *Haskins,* 345 F.2d 111, 114 (6 Cir. 1965).

[21] Moreover, it should be noted that Medow refused to be interviewed by petitioner's investigators. R. 14; Tr. 31-43. Hence the testimony concerning the time prior to the allegations of the indictment and at variance with the bill of particulars was indeed a surprise to the defense, as it might not have been, had Medow permitted himself to be interviewed. Only presuming petitioner guilty justifies any inference that he should have known of the 1967 evidence.

Admitting this evidence, further, permitted petitioner to be convicted on the basis of conduct not alleged in the indictment, in violation of his Sixth Amendment right to indictment. *Stirone* v. *United States,* 361 U.S. 212 (1960).

[22] Where a defendant pleads not guilty, cross-examines prosecution witnesses, and requests instructions on intent, as in the case at bar, the Seventh Circuit has specifically held that such does not justify the prosecution's introduction of evidence of a prior criminal offense:

> "[A] plea of not guilty cannot, by itself, be construed as raising such a keen dispute on the issue of willfulness and intent so as to justify admission of this type of evidence. . . .
>
> "[I]t is reversible error in a jury trial . . . to allow the government, during its case in chief, to introduce evidence of a prior criminal act of the accused in order to show willfulness

(footnote continued)

concluding that it is inapplicable to the case at bar. (App. A, p. 7) Since here, as in *Fierson,* petitioner did not testify or otherwise present positive evidence, the court's purported distinction is both illogical and ill-founded.

Since the government was permitted to introduce crucial, substantial evidence of prior criminal conduct, which was neither alleged in the indictment nor mentioned in the bill of particulars, and which pre-dated the earliest possible date prosecutable under this indictment in accordance with the applicable statute of limitations, petitioner's conviction should not be permitted to stand.

Certiorari should be allowed to review the Seventh Circuit's unprecedented relaxation of the limiting effect both of a bill of particulars and of the statute of limitations, particularly since the instant decision conflicts with principles concerning the latter announced in *Toussie* v. *United States,* 397 U.S. 112 (1970).

4.

Petitioner was deprived of his right to a fair trial by the prosecution's prejudicial closing argument, which:

A. improperly referred to and heavily relied upon the erroneously admitted evidence at issue in Point 3, supra; and

B. incredibly stated that defense counsel had argued—when he had not—that petitioner was guilty of bribery.

A. Inasmuch as the court had already permitted the government to adduce evidence that petitioner's transac-

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(footnote continued)

and intent when, as here, the accused does not, except for [pleading not guilty, cross-examining, and] demanding an instruction on the requisite wilfulness and intent, otherwise put that issue in dispute." *United States* v. *Fierson,* 419 F.2d 1021, 1023 (7 Cir. 1969).

tions with Medow went back to 1967, counsel for the government repeatedly, during closing argument, made pointed reference to the pre-indictment alleged criminal activities and referred to the alleged extortion as having been going on for six years. (Tr. 452, 457, 459, 483-84) And since the court already—erroneously—had ruled such evidence admissible, under the court's instructions and the government's argument, the jury was supposed to consider such evidence. (See Point 3, *supra.*) This argument, predicated on inadmissible evidence essential to the government's case, was prejudicial.

B. After defense counsel had concluded his closing argument, the prosecution in final argument inaccurately stated:

> "He [Mr. Lynch, defense counsel] has asked you to believe that Callahan is guilty of a crime he is not charged with. . . . Mr. Lynch has argued the crime was bribery." (Tr. 481) [23]

Petitioner's prompt motion for mistrial based on the prosecutor's false statement of defense counsel's position was denied. (Tr. 481)

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[23] Defense counsel unsuccessfully had requested instructions to the effect that if the jury found that petitioner merely received a gift, or even that he committed the state offense of bribery, but that he did not commit extortion, then he must be acquitted of extortion. (See Point 5A, pp. 27-30, *infra.*) Counsel indicated during the conference on instructions that this was petitioner's theory of the case. (See, *e.g.*, Tr. 435-42). However, defense counsel chose not to make any such argument to the jury since he could not convince the judge to give instructions supportive thereof, and no mention or implication of bribery was made by defense counsel in his closing argument. (Tr. 462-80) Hence the prosecutor's reference to the anticipated argument which defense counsel in fact had not made prejudicially brought to the jury's attention the inexplicable (to the jury, that is) reference to a totally unrelated and uncharged crime.

This argument was unquestionably prejudicial to petitioner. Not only did it call to the jury's attention an inexplicable reference to a totally different and uncharged crime; additionally, and most importantly, it conveyed to the jury the erroneous and extremely harmful notion *that defense counsel believed his client guilty* of some crime.

• • •

Yet the panel discusses and disposes of petitioner's contention that the prosecution's argument, in the context of the case at bar, operated to deprive him of a fair trial, merely by stating:

> "It is contended that the government counsel was guilty of misconduct in closing arguments . . . . We find no error in any of these assignments . . . ." (App. A, p. 10)

These two aspects of the government's arguments to the jury, just before the jury was instructed and sent to deliberate, were prejudicial to petitioner and deprived him of a fair trial. The prosecution called to the jury's attention evidence of prior crimes which should not have been admitted in the first instance, see Point 3, *supra*, relying heavily upon such evidence to support conviction upon Count II; and erroneously misstated defense counsel's argument to the jury in such a manner as to call to the jury's attention the possibility that petitioner committed an additional, uncharged offense, and to imply that counsel thought his client guilty of a crime. The probable impact of these remarks, rendering petitioner's trial patently unfair, is determinative. *Berger* v. *United States,* 295 U.S. 78, 88 (1935).

The Seventh Circuit has disposed of this issue in utter disregard of the mandate of this Court in *Kotteakos* v. *United States,* 328 U.S. 750, 763-65 (1946), to consider the claimed error in light of the factual framework of the

entire case, and has affirmed without declaring a belief beyond a reasonable doubt, as required by *Chapman* v. *California*, 386 U.S. 18, 24 (1967), that the error could not have contributed to the conviction. Within the context of this case, (see App. C), the argument complained of constituted prejudicial error.

Certiorari should be allowed, both for the reasons advanced in the preceding Point (pp. 18-23, *supra*), and so that this Court may express itself as to the propriety of government counsel erroneously stating that defense counsel believes his client guilty of a crime.

5.

Petitioner was prejudiced by the court's improper instructions to the jury and by its refusal to instruct per defense requests, in the following respects:

A. Refusal to instruct concerning bribery and mere receipt of gratuity;

B. Refusal to give accomplice testimony instruction;

C. Instruction regarding testimony of immunized witness.

Moreover, the court's erroneous refusal to instruct on petitioner's theory of the case effectively precluded petitioner from presenting said theory to the jury, in derogation of petitioner's due process rights and of his Sixth Amendment right to present evidence.

In view of the paucity of evidence tending to show extortion,[24] the court's charge to the jury was crucial. The

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[24] Petitioner maintains that the evidence was insufficient. See Point 2, *supra*.

grievous errors in that charge deprived petitioner of his constitutional right to a fair trial.[25]

A. Refusal to instruct concerning bribery and mere receipt of gratuity.

Petitioner requested that the court instruct the jury pursuant to some or all of his requested instructions FF,

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[25] Each of the issues raised in this Point deals with error in the court's charge to the jury. Accordingly, it is appropriate to reflect upon the respective roles and duties of the trial and appellate courts in this regard:

> "The role of the trial judge was to see that all competent evidence that was offered came before the jury, that incompetent evidence was excluded, and that the jurors were fully instructed on the applicable law. The role that this as an appellate court has is to determine whether the trial judge committed prejudicial error in his rulings or charge . . ." *Kansas City Star Co.* v. *United States,* 240 F.2d 643, 660 (8 Cir. 1957).

It is essential for the reviewing court to keep in mind that, even if the appellate judges believe that the evidence was sufficient to sustain a conviction, this must not interfere with their determination concerning the propriety of the charge to the jury; to act otherwise, as has been noted by this Court, would be tantamount to interposing the appellate judges' belief in the defendant's guilt in place of the jury's verdict, in derogation of defendant's constitutional right to trial by jury:

> "In view of the Government's insistence that there is abundant evidence to indicate that . . . [defendant was guilty], it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials. . . .
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> ". . . All law is technical if viewed solely from concern for punishing crime without heeding the mode by which it is accomplished. . . . From presuming too often all errors to be

(footnote continued)

GG, HH, and JJ (R. 52). While indicating to defense counsel that he would permit counsel to argue to the jury that petitioner's conduct might amount to bribery and not to extortion,[26] the trial judge refused to give the requested instructions.[27] (Tr. 435-39)

(footnote continued)

> 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." *Bollenbach* v. *United States,* 326 U.S. 607, 614 (1946).

These concepts should guide this Court in considering this aspect of the cause. Apparently they were ignored by the Seventh Circuit. (App. A, p. 10)

[26] Accordingly, defense counsel chose not to argue this issue to the jury in absence of supportive instructions from the court. See pp. 36-37, *infra;* see *United States* v. *Phillips,* 217 F.2d 435, 440 (7 Cir. 1955).

[27] This series of refused instructions, all contained in R. 52, is as follows:

> "The mere voluntary payment of money or delivery of property, unaccompanied by any fear of economic loss, would not constitute extortion. Unless the payments here alleged were made under some form of compulsion, there is no violation of the law within the charges set out in the indictment." Def. Inst. No. FF; Devitt & Blackmar Inst. No. 62.09.
>
> "A private citizen commits the crime of bribery who, promises or tenders any property to a public employee with intent to influence the performance of any act related to the employee's employment or function.
>
> "A public employee commits the crime of bribery by receiving any property knowing that the property was tendered with

(footnote continued)

While bribery and extortion can no longer be regarded as necessarily mutually exclusive,[28] clearly there can be bribery under State law[29] (as defined by Def. Inst. GG) which does not amount to extortion under the Hobbs Act. Although petitioner denied that his conduct with regard to Medow might amount even to bribery under State law, it was reasonably possible that the jury might regard his dealings with Medow as partaking of some degree of criminality; thus, petitioner reasonably feared that the jury might nonetheless convict him because they believed his conduct amounted to something illegal, even if not to extortion. Hence petitioner was entitled to instructions advising the jury that if they found he committed bribery as defined by State law but that he did not commit extortion, they must acquit him of the offense charged.

(footnote continued)

intent to cause him to influence the performance of any act related to the employment or function of said public employee.

"A public employee is a person who is authorized to perform an official function on behalf of, and is paid by a City of the State." Def. Inst. No. GG; I.P.I. Crim. Inst. No. 21.07. [I.P.I. Crim. refers to Illinois Pattern Jury Instructions in Criminal Cases.] See pp. 6-7, *supra*.

"Extortion and Bribery are separate and distinct offenses." Def. Inst. No. HH.

"If, from all the evidence, you believe beyond a reasonable doubt that the Defendant committed the offense of bribery but did not commit the offense of extortion, you are to find him not guilty of extortion." Def. Inst. JJ.

[28] See, *e.g.*, *United States* v. *Braasch*, 505 F.2d 139, 151 & 151 n.7 (7 Cir. 1974); *United States* v. *Kahn*, 472 F.2d 272, 278 (2 Cir. 1973).

[29] See State statute set forth at p. 6, *supra*.

And even if his conduct did not amount either to bribery or extortion, the jury might still have perceived a taint of criminality; hence requested instruction FF dealt with mere receipt of gratuity, unaccompanied by any fear of economic loss on the part of the giver.

The court's refusal to pinpoint the distinction between receipt of a wholly voluntary gift or even bribery on the one hand, from Hobbs Act extortion on the other, precluded the jury from finding petitioner not guilty if they found that his receipt of the liquor from Medow was wholly voluntary and uncoerced on Medow's part, or even if they decided that bribery but not extortion was involved. The series of instructions requested by petitioner (FF, GG, HH, and JJ) would have protected petitioner from conviction if the jury found that petitioner's conduct, though perhaps amounting to some state criminal offense, such as bribery, did not amount to extortion under the Hobbs Act. Refusing these instructions was tantamount to precluding petitioner from presenting his theory of defense to the jury. See cases and argument, pp. 36-37, *infra*.

B. Refusal to give accomplice testimony instruction.

The court refused to instruct pursuant to petitioner's tendered instructions on accomplice testimony (Def. Inst. Q & S), ruling that as a matter of law, Medow could not be regarded as an accomplice in this case.[30] (Tr. 425-26)

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[30] The refused instructions regarding Medow, contained in R. 52, are:

"An accomplice is one who voluntarily participates in the commission or the planning of a crime.

"If the jury believes that the witness, Robert J. Medow, directly participated as an accomplice in the commission of the

(footnote continued)

The proffered instructions were intended to be alternative (*i.e.*, either Q or S, but not both, was to be given, if either was to be given); Q in the event the court desired to leave to the jury the question whether or not Medow was an accomplice, or S in the event that the court determined as a matter of law that he was.

Evidently the government believed Medow to have been guilty of some offense—else why the grant of immunity? (See Tr. 326-27; R. 42-43) That Medow believed himself culpable is demonstrated by his having consulted an attorney who advised him to request immunity. (Tr. 343-45)[31]

One is not legally precluded from being technically an "accomplice" merely because one is alleged also to be

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(footnote continued)

offense charged, his testimony should be closely examined and weighed with great care.

"If the jury believes the testimony of an accomplice to be true beyond a reasonable doubt, that testimony is sufficient to convict the defendant, even though it is not corroborated by any other evidence." (Def. Inst. No. Q, LaBuy Inst. No. 6.07)

"An accomplice is one who voluntarily participates in the commission or the planning of a crime.

"The witness, Robert J. Medow, is an accomplice of the accused in this case. As an accomplice his testimony must be closely examined and weighed with great care.

"If the jury believes the testimony of an accomplice to be true beyond a reasonable doubt, that testimony is sufficient to convict the defendant, even though it is not corroborated by any other evidence." (Def. Inst. No. S, LaBuy Inst. No. 6.07)

["LaBuy Inst." refers to instructions contained in LaBuy, Manual on Jury Instructions in Federal Criminal Cases (1965).]

[31] Moreover, the record reflects that Medow never initiated any complaint concerning petitioner, but gave information only when FBI agents contacted him after being directed to him by an "anonymous informant." (Tr. 192-93)

the victim of the same crime; *viz.*, the status of a woman alleged to have been illegally aborted, or to have been illegally transported in interstate commerce for purposes of prostitution; or, indeed, the status of the giver of a bribe.[32]

Under the factual circumstances of the case at bar, refusal to give either No. Q or No. S precluded petitioner from receiving that protection to which he was entitled, afforded by law to one against whom an accomplice gives testimony. See, *e.g.*, *Phelps* v. *United States*, 252 F.2d 49, 52 (5 Cir. 1958); *Dunn* v. *United States*, 318 F.2d 89, 93 (5 Cir. 1963); *Hull* v. *United States*, 324 F.2d 817, 823 (5 Cir. 1963) (general credibility and reasonable doubt instructions did not take place of requisite accomplice testimony instruction); see *Cash* v. *Culver*, 358 U.S. 633, 637 (1959).

At the very least, the jury should have been given the opportunity to make an independent factual determination, based on an appropriate instruction such as No. Q, whether or not Medow was to be regarded as an accomplice for purposes of the manner in which his testimony was to be evaluated by the jury.

C. Instruction regarding testimony of immunized witness.

Over defense objection (Tr. 412-16), the court instructed the jury concerning immunized witnesses and the manner in which their testimony was to be regarded.[33] (Tr. 509-10)

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[32] *Cf.* pp. 27-30, *supra*, especially Def. Inst. No. GG, at pp. 28-29, *supra*, fn. 27, taken from I.P.I. Crim. No. 21.07, setting forth Illinois law. See pp. 6-7, *supra*.

[33] The instructions given concerning immunized witnesses are as follows:

(footnote continued)

Taken in the context of the entire case—including the jury's prior awareness that Medow had received a grant of immunity via direct examination by the government over defense objection (Tr. 376)—the only possible effect of these instructions was to improperly cause the jury to give unwarranted extra credence to Medow's testimony. For while the court stressed that the immunized witnesses —including Medow (Tr. 326-27; R. 42-43)—were open to perjury prosecution if they gave false material evidence, thus leading the jury by natural inference to believe that

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(footnote continued)

"One final word about the immunity question which you have heard a good bit about.

"Two of the witnesses who testified, of course, were granted a grant of immunity pursuant to a court order after a petition by the government requesting such an order.

"Under the law, this means that none of the testimony that they gave during the trial, nor any information, directly or indirectly derived from their testimony, can ever be used against them in any subsequent proceedings; however, if any of them testified untruthfully, they still could be prosecuted for perjury for making a false material statement, even though he had a grant of immunity with respect to the testimony he was giving.

"The matters concerning testimony given under grant of immunity, should be considered by you in weighing the credibility of the testimony of the witnesses involved, and the testimony of a person granted immunity should be examined and weighed by you with greater care than the testimony of an ordinary witness.

"It is, of course, obvious, I think, that the fact that these two witnesses were granted immunity is not in and of itself, evidence with respect to Mr. Callahan's guilt or innocence, but the fact that the witnesses testified under grant of immunity, however, doesn't mean that that is a justification for finding Mr. Callahan not guilty if you find, in fact, from all the evidence including their testimony, that his guilt has been proven beyond a reasonable doubt." (Tr. 509-10)

such witness would be *less* likely to lie under oath than an "ordinary," non-immunized witness, *the jury was at no point during the charge informed that such sanction in fact was open and available against* **any** *witness*, immunized or not, who might give false material testimony. See *United States* v. *Reid*, 410 F.2d 1223, 1227-28 (7 Cir. 1969).

Moreover, the entire thrust of the immunized witness instructions was in favor of the jury's believing such witnesses. (See instructions set forth in footnote 33, pp. 32-33, *supra;* Tr. 509-10). Indeed, the court's instruction that "the testimony of a person granted immunity should be examined and weighed by you with greater care than the testimony of an ordinary witness," (Tr. 510), while intended as a protection for petitioner, might well have cut the other way to his detriment; for it could reasonably be interpreted, in context and without further clarification, to mean that such testimony should be given more weight than the testimony of an ordinary witness.[34]

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[34] One further issue relative to immunity, involving considerations of judicial and public policy, should be noted.

The Seventh Circuit has held that a defendant lacks standing to raise questions concerning the validity of the scope of a grant of immunity to a witness, *United States* v. *Braasch*, 505 F.2d 139, 146 (7 Cir. 1974), and, pursuant to *Braasch's* holding regarding 18 U.S.C. 6003(b)(2), (*id.* at 146), the government's petition in the case at bar requesting that Medow be granted immunity, (R. 42), was technically sufficient, in that the government set forth therein that Medow had informed the government that he intended to assert his Fifth Amendment privilege. (R. 42, par. 2) However, the trial court herein made no independent determination whether or not Medow in fact was subject to prosecution for any offense (Tr. 10-15); this aspect of immunity was not dealt with in *Braasch*.

If a witness under subpoena took the stand without grant of immunity and claimed his privilege against self-incrimination, the court

(footnote continued)

In the factual context of this case, (see App. C; see Point 2, *supra*), the various errors herein complained of regarding the giving and refusing of jury instructions deprived petitioner of a fair trial.

(footnote continued)

would, of necessity, determine whether such claim was valid; if it were not, the witness could be compelled to testify under pain of contempt.

To permit the mere granting of a government petition to immunize a witness—based only upon the government's statement that he has indicated he will claim the privilege when in fact no valid basis for claim of privilege may exist—to justify the giving of such instructions concerning testimony of immunized witnesses as were given herein, is to open the door to abuse of the immunity statute by wholesale grants of unwarranted immunity in order to enhance the credibility of witnesses by virtue of their having been immunized.

(It should be pointed out that the trial court noted, ex post facto, during the conference on instructions, that there did not appear to have been any legal justification to support the grants of immunity to Sannasardo and Medow in this case, in that there was no valid claim of privilege as to any prosecutable offense regarding either immunized witness. (Tr. 413-16))

If no independent determination of the validity of the prospective witness' anticipated claim of privilege is to be required, then at the very least, to mitigate against the kind of prejudice asserted in the case at bar by reason of the immunized witness instructions, a concomitant instruction must also be given to the effect that even an "ordinary" witness is equally subject to prosecution for perjury committed on the stand. Anything less than this results in prejudice, as is claimed herein, by the court's singling out of immunized witnesses as being possibly subject to prosecution for perjury. *Cf. United States* v. *Reid*, 410 F.2d 1223, 1227-28 (7 Cir. 1969).

With regard to the actual danger—or lack thereof—of any such prosecutions, see colloquy during conference on instructions, Tr. 417-18.

The court's erroneous refusal to instruct on petitioner's theory of the case effectively precluded petitioner from presenting said theory to the jury, in derogation of petitioner's due process rights and of his Sixth Amendment right to present evidence.

As noted above, pp. 27-30, *supra,* petitioner requested certain instructions regarding his activities amounting to nothing more than receipt of a freely given gratuity, or, at most, to bribery, rather than extortion. While stating he would permit counsel to make such argument, the court refused so to instruct the jury. (Tr. 435-42)

Because no instructions covering this aspect of the case were given by the court, petitioner's trial counsel chose not to make such argument to the jury. (Tr. 462-80)

The court erred in refusing these instructions, as was pointed out above, pp. 27-30, *supra.* Where a defendant presents a theory supported by any evidence, he has a right to have the jury instructed upon that theory. *United States* v. *Grimes,* 413 F.2d 1376 (7 Cir. 1969); *Levine* v. *United States,* 261 F.2d 747 (D.C. Cir. 1958); *United States* v. *Phillips,* 217 F.2d 435 (7 Cir. 1955). Here, there was ample evidence to support the theory that petitioner's transactions with Medow as alleged in Count II amounted to nothing more than receipt of a gift, or, at most, to bribery under State law rather than to extortion under the Hobbs Act.[35]

Defense counsel's being able to argue a defendant's theory of the case to the jury does not cure the error in refusing to instruct thereon:

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[35] See Point 2, pp. 14-17, *supra;* Point 5A, pp. 27-30, & fn. 27, *supra.*

> "An argument to a jury, however, on a legal issue, unsupported by instruction to which the defendant was entitled, constitutes an aggravation rather than a mitigation of the harmful effect of the court's refusal to instruct." *United States* v. *Phillips, supra,* 217 F.2d at 440.

Moreover, since petitioner has a due process right to present his theory of the case to the jury, the court's refusal to instruct the jury pursuant thereto, which impelled counsel not to make the argument unsupported by instructions, amounted to deprivation of due process of law and of petitioner's Sixth Amendment right to present evidence. See *Holt* v. *Virginia,* 381 U.S. 131, 136 (1965); *cf. Washington* v. *Texas,* 388 U.S. 14 (1967).

* * *

The questions raised herein dealing with the court's errors concerning instructions—including the argument that improper grants of unwarranted immunity prejudice a defendant by unduly bolstering the immunized witness' testimony before the jury—should be considered by this Court, since such errors deprived petitioner of a fair trial, and because these questions should be, but apparently have not been, resolved by this Court.

Moreover, certiorari should be allowed so that this Court may speak to a defendant's due process right to have the jury instructed pursuant to his theory of the case, and to determine whether Fifth Amendment due process and the Sixth Amendment right to present evidence necessarily include the right to have the jury so instructed.

6.

The trial court committed prejudicial error by instructing the jury, in advance of any specific request by the jury, that the court would not consider any jury request during deliberations for portions of the evidence presented at trial. Such instruction constituted an impermissible abdication of judicial responsibility to exercise judicial discretion upon any such request if and when it may have arisen, effectively precluding the jury in advance from making any such request. Certiorari should be allowed so that this Court, in the exercise of its supervisory powers, may prevent trial courts from following this impermissible procedure.

The trial court instructed the jury, in advance of any specific request and as part of its general charge just before the jury retired to deliberate, that the court would not consider any jury request during deliberations for portions of the evidence presented at trial.[36]

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[36] The court instructed the jury as follows:

"I will tell you now, *don't waste your time asking me questions about what the evidence was on a particular subject. We don't respond to questions of that sort.* It is the recollection of the 12 of you who will deliberate the verdict in this case, that is going to govern that.

We don't have a written transcript typed up. We have stenotype notes. We do not have an available transcript, but if we did, we wouldn't give it to you on a single subject because it would highlight that evidence out of proportion with the other evidence. So, *there isn't any point in your sending me an inquiry as to what the evidence was on a particular subject.*

On the other hand, if you have some questions as to what the law is, if you have some doubts, notwithstanding my very clear instructions, if you have some doubts as to what the law

(footnote continued)

Thus, the court precluded the jury in advance from making any legitimate inquiry it may later have had concerning the evidence in the case, although judicial action on such requests clearly is discretionary with the court. Permitting a jury to ask such questions and allowing the jury to have portions of evidence read to them certainly may be proper.[37]

Moreover, a court's refusal to grant such a jury request can result in such fundamental unfairness to defendant that reversal is necessitated. *United States* v. *Jackson,* 257 F.2d 41, 42-43 (3 Cir. 1958). In *Jackson,* the reviewing court held that defendant was entitled, as a matter of right, to have the jury informed as to pertinent parts of the evidence in accordance with their query, and reversed where the trial court had refused their request.

Where, as here, the jury was precluded in advance by the court's charge from making any specific inquiry, it is impossible to ascertain what, if any, specific request may have been made, had the erroneous charge not been given; nor can it be determined whether the jury may have had some request concerning the evidence, the refusal of which

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(footnote continued)

is, I may find it appropriate to clarify that doubt since it is my responsibility.

What the facts are, is your responsibility, and don't ask me any questions about what the evidence on any particular subject was, or how a witness testified." (Tr. 517) (Emphasis added.)

[37] *United States* v. *Hurst,* 436 F.2d 1092 (5 Cir. 1971); *United States* v. *Dellinger,* 472 F.2d 340, 380 (7 Cir. 1972); *Sears* v. *United States,* 343 F.2d 139, 144 (5 Cir. 1965); *Easley* v. *United States,* 261 F.2d 276, 277 (5 Cir. 1958).

would have amounted to reversible error, as in *Jackson, supra.*

In effect, the court told the jury he had no discretion to grant any request for evidence: "We don't respond to questions of that sort." (Tr. 517) Such refusal to exercise discretion in this regard has been held reversible error in two recent Illinois Supreme Court cases,[38] which, although not controlling herein, are persuasive, particularly in light of federal case law from other areas of law concerning failure to exercise discretion in discretionary matters.[39]

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[38] In *People* v. *Queen,* 56 Ill.2d 560, 310 N.E.2d 166 (1974), in reply to a jury request to have defendant's testimony read to them during deliberations, the trial court advised the jury that it must decide on the basis of testimony already heard, and told them, "I cannot have any testimony of any witnesses read to you." The Illinois Supreme Court reversed and remanded, holding that action on such requests is discretionary, and: "There is error when a trial court refuses to exercise discretion in the erroneous belief that it has no discretion as to the question presented." 310 N.E.2d at 169.

And in *People* v. *Autman,* 58 Ill.2d. 171, 317 N.E.2d 570 (1974), the same court reversed and remanded in two cases because of the trial court's blanket refusal to consider jury requests to have testimony reviewed. *Id.* at 572-73. Since the request in Autman's case related to significant testimony, the court held prejudicial error occurred; moreover, in Pulley's case, wherein the jury did not specify which testimony it wished to hear again, "since the request *may have* related to critical testimony . . . defendant was entitled to have the request considered by the trial court." *Id.* at 573. (Emphasis added.)

[39] Failure to exercise discretion upon requests for disclosure of pre-sentence investigation reports (pursuant to F.R.Cr.P. (32(c)(2)) has been held to amount to an abuse of discretion. *United States* v. *Brown,* 470 F.2d 285, 287-89 (2 Cir. 1972); *United States* v. *Bryant,* 442 F.2d 775, 778 (D.C. Cir. 1971). In both *Brown* and *Bryant,* the trial court's refusal to disclose such information based upon a

(footnote continued)

In the case at bar, the trial court improperly refused to exercise his discretion by precluding the jury from asking for any evidence during deliberations; this amounted to an abdication of judicial responsibility and was such an abuse of discretion that a new trial should be ordered.

Yet the Seventh Circuit, with characteristic aplomb, has disposed of this substantial contention merely by stating:

> "It is also said that the judge erred in his final instruction to the jury which admonished the jurors not to make inquiries as to the specific testimony which had been given. We find no error in any of these assignments nor do we perceive error in any of the court's instructions. . . ." (App. A, pp. 9-10)

To prevent district judges from having *carte blanche* to abdicate their responsibility to exercise discretion by instructing as in the case at bar, this Court should, for the first time, rule upon the propriety of such an instruction. In the exercise of its supervisory power, this Court should grant certiorari to review the impermissible procedure allowed by the Seventh Circuit.

(footnote continued)

blanket policy of non-disclosure rather than upon the exercise of discretion on a case-by-case basis necessitated reversal. See also *United States* v. *Powell*, 487 F.2d 325, 329 (4 Cir. 1973) (dictum).

Similarly, where in making the sentencing decision the trial judge refuses to exercise discretion which he clearly possesses, Courts of Appeals have set aside sentences, holding such refusal to exercise discretion equivalent to an abuse of discretion. See, *e.g.*, *United States* v. *Wiley*, 267 F.2d 453 (7 Cir. 1959); *United States* v. *Daniels*, 446 F.2d 967 (6 Cir. 1971); *United States* v. *Hartford*, 489 F.2d 652 (5 Cir. 1974); *Briscoe* v. *United States*, 391 F.2d 984 (D.C. Cir. 1968); *Woosley* v. *United States*, 478 F.2d 139 (8 Cir. 1973).

CONCLUSION

For any or all of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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